

HON. RICARDO S. MARTINEZ

**UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE**

BACKPAGE.COM, LLC,

Plaintiff,

and

INTERNET ARCHIVE,

Plaintiff-Intervenor,

v.

ROB MCKENNA, Attorney General of the  
State of Washington, et al.,

Defendants, in their official capacities.

Case No.: 2:12-cv-00954-RSM

**THE INTERNET ARCHIVE'S  
OPPOSITION TO MOTION TO  
DISMISS OF DEFENDANT KITSAP  
COUNTY PROSECUTING ATTORNEY  
RUSSELL D. HAUGE**

**I. INTRODUCTION**

The Internet Archive (“the Archive”) is seeking to enjoin enforcement of Washington Senate Bill 6251 (“SB 6251”) on the grounds that it violates Section 230 of the Communications Decency Act of 1996 (47 U.S.C. § 230), the First and Fourteenth Amendments of the United States Constitution, and the U.S. Constitution’s Commerce Clause. The Archive’s suit names, in their official capacities, the Attorney General of the State of Washington and each of the state’s

INTERNET ARCHIVE’S OPPOSITION  
TO MOTION TO DISMISS - 1  
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39 county prosecuting attorneys. (Dkt. No. 36) (“Archive Compl.”). Defendant Russell D. Hauge, Kitsap County’s prosecuting attorney, has moved that any claims against him be dismissed pursuant to Fed. R. Civ. P. 12(b)(6). (Dkt. No. 37) (“Mot.”). Mr. Hauge argues that the Archive’s Complaint does not “identify [an] act committed under color of law by Mr. Hauge which caused a constitutional violation.” *Id.* at 3.

This Court should deny Mr. Hauge’s Motion. The Archive brought a pre-enforcement challenge to the statute and therefore need not argue that Mr. Hauge or any other law enforcement official has acted inappropriately. This Court granted the Archive’s motion to intervene because “there is no more direct, specific and non-representative interest a [prospective] intervenor could have than exposure to criminal liability.” (Dkt. No. 33 at 6) (“Order Granting Mot. Intervene”) (internal quotation marks/citation omitted). As the Archive subsequently detailed in its Complaint, SB 6251 could expose the Archive to criminal liability. The Archive has alleged sufficient facts to state a claim and to show that this Court should permanently enjoin enforcement of SB 6251. Mr. Hauge was properly named as a Defendant because, in his official capacity as county prosecutor, he would be responsible for enforcing SB 6251—a law that is both unconstitutional and pre-empted by federal law.

## II. FACTUAL SUMMARY

The Internet Archive was founded in 1996 to build an Internet Library. Archive Compl. ¶ 13. The Archive, a 501(c)(3) non-profit, collects books, audio, video, webpages and other content, and makes it available online to the public free of charge. *Id.* ¶¶ 13-14. Part of the Archive’s mission is to create a representative and historically accurate record of the Internet. In pursuit of this goal, the Archive regularly gathers “snapshots” of Internet content, and currently maintains more than 150 billion webpages dating from 1996 to nearly the present. *Id.* ¶ 16.

SB 6251 criminalizes the dissemination of any third-party content that depicts a minor and contains an “implicit offer” of sex for “something of value.” Archive Compl. ¶ 26; *see also* Wash. Rev. Code Ann. § 9.68A.004 Sec. 2(1)(a)-(b) (West 2012) (“SB 6251”). Online service

1 providers cannot defend themselves by demonstrating that they did not know, or had no reason to  
2 know, the age of a minor depicted in an advertisement. Archive Compl. ¶ 26; *see also* SB 6251  
3 Sec. 2(2).

4 Backpage.com filed suit on June 4, 2012, seeking to declaratory and injunctive relief.  
5 (Dkt. No. 1). On June 5, the Court ruled that “Backpage.com [had] shown a likelihood of  
6 success on the merits of its claim” and entered a Temporary Restraining Order preventing the  
7 Defendants “from taking any actions to enforce SB 6251 or pursue prosecution under the law in  
8 any way.” (Dkt. No. 7 at 3). The Internet Archive moved to intervene on June 14 (Dkt. No. 22),  
9 and the Court granted the Archive’s motion on July 2. Order Granting Mot. Intervene at 9.

10 The Archive’s complaint named Washington State Attorney General Rob McKenna and  
11 Washington State county prosecutors “in their official capacities as representatives of the State  
12 of Washington and their respective counties.” Archive Compl. ¶ 9. It noted that the county  
13 prosecutors, including Mr. Hauge, “are responsible for the enforcement of criminal laws of the  
14 State of Washington and for initiating proceedings for the arrest and prosecution of individuals  
15 suspected of felony crimes . . . in which their respective counties are parties.” *Id.* at ¶ 8.

16 This Court barred enforcement of SB 6251 before it could take effect, and before the  
17 Archive filed its Motion to Intervene, and therefore the Archive does not allege that any of the  
18 Defendants have initiated investigations or prosecutions against it. Rather, the Archive has “a  
19 reasonable apprehension of prosecution under SB 6251” should the law take effect. Archive  
20 Compl. ¶¶ 16, 26. As the Court noted in granting the Archive’s Motion to Intervene, “even if the  
21 Internet Archive had unlimited resources, it could not obtain and retain the identification of all  
22 those persons whose images are displayed in connection with an ‘implicit offer for a commercial  
23 sex act to occur in Washington’ on the websites that it indexes.” Order Granting Mot. Intervene  
24 at 8.

25 On July 5 Mr. Hauge moved under Federal Rule of Civil Procedure 12(b)(6) to dismiss  
26 the Archive’s claims against him on the grounds that the Archive “has failed to identify an act

committed under the color of law by Mr. Hauge which caused a constitutional violation or deprived it of a right secured by law.” Mot. at. 3.

### III. ARGUMENT

The Archive is entitled to relief because SB 6251 violates both federal law and the U.S. Constitution. Under Supreme Court precedent, the Archive is entitled to challenge such a law *before* it takes effect and criminalizes constitutionally-protected activities. *See Babbitt v. United Farm Workers National Union*, 442 U.S. 289 (1979).

Mr. Hauge’s motion to dismiss should be denied because (1) SB 6251 violates both federal law and the U.S. Constitution; (2) the Archive is entitled to challenge such a law *before* it takes effect and criminalizes constitutionally-protected activities; and (3) Mr. Hauge, who is required by Washington’s Constitution to enforce its laws, is properly named as a Defendant in his official capacity as county prosecutor.

The Archive’s Complaint “contain[s] sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). As alleged in the Complaint, the Archive automatically collects and displays massive numbers of webpages. Archive Compl. ¶ 16. SB 6251 could subject the Archive to criminal liability for collecting and displaying certain content from sites like Backpage.com in the event that they were made aware of it. *Id.* at ¶¶ 22 and 26. Thus, as the Court noted in granting the Archive’s Motion to Intervene, the Archive “is particularly concerned with the elements of the statute that it contends impose liability on ‘indirect’ disseminators of information, such as itself.” Order Granting Mot. Intervene at 8. Taken as true, these facts state a plausible claim to relief.

Mr. Hauge points out that the Archive’s Complaint does not describe “any action he may have taken,” Mot. at 3, but this does not address the substance of the Archive’s Complaint and the relief it seeks. The Archive is entitled to challenge SB 6251 *before* it becomes law, and before any Washington official is tasked with taking any action to enforce it. The Supreme Court has held that “[w]hen contesting the constitutionality of a criminal statute, ‘it is not

1 necessary that [the plaintiff] first expose himself to actual arrest or prosecution to be entitled to  
2 challenge [the] statute that he claims deters the exercise of his constitutional rights.” *Babbitt v.*  
3 *United Farm Workers National Union*, 442 U.S. 289, 298 (1979) (quoting *Steffel v. Thompson*,  
4 415 U.S. 452, 459 (1974)). It is sufficient that the Archive intends to take actions that are  
5 protected by the Constitution but would be improperly criminalized by the statute. “When the  
6 plaintiff has alleged an intention to engage in a course of conduct arguably affected with a  
7 constitutional interest, but proscribed by a statute, and there exists a credible threat of  
8 prosecution thereunder, he ‘should not be required to await and undergo a criminal prosecution  
9 as the sole means of seeking relief.’” *Babbitt*, 415 U.S. at 298 (quoting *Doe v. Bolton*, 410 U.S.  
10 179, 188 (1973)).

11 The Archive’s Complaint meets this standard precisely, and therefore Mr. Hauge’s  
12 Motion to Dismiss must be denied. The Archive has a First Amendment right, explicitly  
13 protected by federal law, to continue its work of archiving web pages and making them available  
14 to the public. Under a reasonable interpretation of SB 6251, this conduct would expose the  
15 Archive to criminal liability in Washington.

16 Finally, Mr. Hauge and the other prosecuting attorneys were properly named as  
17 Defendants in their official capacities. The Ninth Circuit has used a two-part test for determining  
18 whether state officials are properly named as Defendants when a state law is challenged. First,  
19 there must be the “requisite causal connection between their responsibilities and any injury that  
20 the plaintiffs *might* suffer.” *Planned Parenthood of Idaho, Inc. v. Wasden*, 376 F.3d 908, 919  
21 (9th Cir. 2004) (emphasis added). Second, the court’s jurisdiction over the defendants must be  
22 “proper under the doctrine of *Ex parte Young*, 209 U.S. 123, 157 (1908), which requires ‘some  
23 connection’ between a named state officer and enforcement of a challenged law.” *Id.* (internal  
24 parallel citations omitted).

25 In *Wasden*, the Ninth Circuit affirmed that Idaho’s attorney general was properly named  
26 as a defendant because he had the authority to “exercise the same power to enforce the statute the

1 [county] prosecutor would have. That power demonstrates the requisite causal connection for  
2 standing purposes.” *Id.* at 920. Using the same logic, the court further held that both the state  
3 attorney general and a county prosecutor were “properly named under *Ex parte Young* with  
4 regard to the exposure to the risk of prosecution.” *Id.*

5 Under this standard, Mr. Hauge and his fellow county prosecuting attorneys are properly  
6 named as defendants. They are tasked by Washington’s constitution with “[i]nstitut[ing] and  
7 prosecut[ing] proceedings before magistrates for the arrest of persons charged with or reasonably  
8 suspected of felonies when the prosecuting attorney has information that any such offense has  
9 been committed.” Wash. Rev. Code Ann. § 36.27.020 (West 2012). This is precisely the  
10 authority wielded by Idaho prosecutors that, as the Ninth Circuit ruled, made it proper to name  
11 them as defendants. *See Wasden*, 376 F.3d at 920. Mr. Hauge would be responsible for  
12 enforcing SB 6251, and his enforcement of SB 6251 may cause him to injure the Internet  
13 Archive by prosecuting it or its employees under the statute. There is also a connection between  
14 Mr. Hauge and the enforcement of the challenged law — he is tasked by the State of Washington  
15 with investigating and prosecuting felonies whenever he “has information that any such offense  
16 has been committed.” § 36.27.020. Thus, under *Wasden*, Mr. Hauge is properly named as a  
17 Defendant in his official capacity as a county prosecutor.

#### 18 IV. CONCLUSION

19 As the Archive detailed in its Complaint, enforcement of SB 6251 would violate the  
20 Archive’s rights under federal law and the United States Constitution. Mr. Hauge, as a county  
21 prosecuting attorney, is one of the state officials who would be tasked with enforcing SB 6251 if  
22 it were to become law. Accordingly, the Archive has stated a claim upon which relief can be  
23 granted, and properly named the Movant as a Defendant. The Court should deny Mr. Hauge’s  
24 Motion to Dismiss.

25 Dated: July 23, 2012

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on July 23, 2012, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system which will send notification of such filing to all counsel of record.

Dated: July 23, 2012

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